83-79

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1983

DARYL R. JENSEN, Jr.,
Petitioner,

vs.

UNITED STATES OR AMERICA,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Defendant was denied his Constitutional rights to counsel and to a fair trial by the Trial Court's limitation of the argument of counsel.

2. Whether a good faith, though erroneous, assertion of a Fifth Amendment privilege to an individual question of a tax return may constitute a defense to a prosecution for willful failure to file a tax return, or may negate the element of willfulness.

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failure to file a tax return, or may negate the element of willfulness.

OPINION BELOW

The United States Court of Appeals for the Tenth Circuit issued its opinion in the United States of America v. Daryl R. Jensen, Jr., No. 82-1648, filed on May 11, 1983, and said opinion was not for routine publication.

JURISDICTION

Petition for Certiorari is sought from the decision of the United States Circuit Court of Appeals, Tenth Circuit, filed and entered May 11, 1983. Jurisdiction of this Court is granted by 28 USC §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

1. Fifth Amendment to the United States Constitution:

> No person shall be held to answer for a capitol, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces or in the Malitia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy

of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. Sixth Amendment to the United States Constitution:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses in his favor, and to have the Assistance of counsel for his defense.

3. 26 USC §7203:

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of

> a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

STATEMENT OF THE CASE

This is a criminal proceeding brought by the Government against the Defendant-Petitioner which charged the Defendant with three counts of Willful Failure to File Income Tax Returns in violation of 26 USC §7203. Jury trial in the above three counts was duly held on April 28, and 29, 1982, and the jury returned a verdict of not guilty as to count 1, involving the 1977 tax returns, and guilty as to counts 2 and 3, involving tax returns of the years 1978 and 1979.

At the trial of the case, the Government introduced the tax returns of the Defendant-Petitioner for the years 1972, 1974, 1975, and 1976, and three documents purporting to be tax returns for the years 1977, 1978 and 1979. On the returns for the years 1977-79, the Defendant either supplied the information

requested as to each lined item or objected to providing the answers upon the grounds of self-incrimination. Attached to said returns were additional materials as memoranda. Also admitted into evidence were two letters from the Government to the Defendant, requesting additional information and filings. Another exhibit was a letter from an I.R.S. agent requesting the Defendant to provide the information requested, or face possible criminal prosecution, and advised Defendant of his right to refuse to provide such information.

Further two letters from the Defendant to the Government were admitted into evidence. These letters express the Defendant's good faith belief in his right to object to the information sought, provided legal support for his position, and suggested courses of action for the Government should they desire to challenge the validity of his claims of Fifth Amendment protection.

Just prior to the making of argument by

the parties, and during the course of arguments over the instructions that the Court was going to give, the Trial Court entered a number of orders limiting the argument of the Defendant's counsel. The Court ruled that good faith in the assertion of the Fifth Amendment privilege on the tax return, and thereby not providing any information, does not negate in any way the willfulness of the Defendant's actions. The Court ruled and ordered that the state of the Defendant's mind, with regard to his assertion of the privilege, was out of the case and as a matter of law could not be any justification for the failure to file a return. The Court further explicitly ordered the counsel for the Defendant not to base any part of his argument on the Defendant's assertion of his Fifth Amendment rights nor in any way to mention the Fifth Amendment. Additionally, the Court ordered counsel not to argue from any of the evidence, or read any evidence or instruction, which mentioned the

Fifth Amendment claim of privilege by the Defendant. Finally, the Court ordered counsel not to argue the Defendant's state of mind, intent, or beliefs, if they had any relation to his claim of a Fifth Amendment privilege.

Defendant appealed the conviction to the Tenth Circuit Court of Appeals, and on May 11, 1983, a unanimous three Judge panel affirmed the conviction.

ARGUMENT FOR ALLOWANCE OF WRIT

The Trial Court ruled that as a matter of law the Defendant's state of mind and reason for not providing all the information on the tax return, i.e. asserting a Fifth Amendment privilege, was out of the case, could not be any justification for failing to provide the information, and did not bear on the issue of willfulness of the Defendant's failure to file a tax return. The Tenth Circuit Court of Appeals, in affirming the Trial Court, stated, at page 4-5:

> (The Defendant) contends that his good faith, though erroneous, assertion of his Fifth Amendment privilege in response to an individual question on a tax return is a defense to a prosecution for willful failure to file a tax return. This contention is meritless.

This ruling is in direct conflict with and contrary to the holdings of various United States Supreme Court opinions, and in addition, other Circuits that have considered the issue, and in addition, other panel decisions by the Tenth Circuit Court of Appeals.

In the United States v. Murdock (II), 290 U.S. 389, 54 S.Ct. 223 (1933), this Court was considering a second appeal upon a second conviction of a willful failure to provide information for a tax return. In United States v. Murdock (I), 234 U.S. 141, 52 S.Ct. 63, the Court had held that as a matter of law the defendant Murdock could not lawfully assert his Fifth Amendment privilege, as the Fifth Amendment did not apply to State law violations. Murdock (II) held that the defendant was entitled to a jury charge that his good faith be-

lief in his erroneous assertion of the privilege would be a defense. Murdock (II) has been reaffirmed, and was used by this Court to arrive at its decision in Garner v. United States, 424 U.S. 648, 96 S.Ct. 1178, 47 L.Ed. 2d 370 (1976). In Garner the Court held and stated, at pages 1186-7:

> A §7203 conviction cannot be based on a valid exercise of the privilege (Fifth Amendment). This is implicit in the dictum of United States v. Sullivan, 47 S.Ct. 607 (1927), that the privilege may be claimed on a return. Furthermore, the Court has held that an individual summoned by the Service to provide documents or testimony can rely on the privilege to defend against a §7203 prosecution for failure to 'supply information.' See United States v. Murdock, 52 S. Ct. 223 (1933) (Murdock II)...The Fifth Amendment itself guarantees the taxpayer's insulation against liability imposed on the basis of a valid and timely claim of privilege, a protection broadened by §7203's statutory standard of 'willfulness.' Because §7203 proscribes 'willful' failures to make returns, a taxpayer is not at peril for every erroneous claim of privilege. The Government recognizes that a Defendant could not properly be convicted for an erroneous claim or privilege asserted in good faith. This concession simply reflects our holding

> in Murdock II. There Murdock's claim of privilege was considered unjustified (because of the holding in Murdock I disapproved in Murphy v. Waterfront Comm'n (Murdock I's holding being that the Federal privilege did not apply to State Law violations)). But the Court recognized that 'good faith' in his assertion would entitle Murdock to acquittal. '(T)he Government,.... we think correctly, assumed that it carried the burden of showing more than a mere voluntary failure, to supply information, with intent, in good faith, to exercise a privilege granted the witness by the Constitution.' 290 U.S. at 397, 54 S.Ct. at 226, 78 L.Ed. at 386.
>
> See United States v. Bishop, 93 S.Ct. 2008 (1973). In this respect, the protection for the taxpayer in a §7203 prosecution is broader than that for a witness who risks contempt to challenge a judicial order to disclose. In the latter case, a mere erroneous refusal to disclose warrants a sanction. See Manness v. Meyers, 95 S.Ct. 584, 592-3 (1975).

In addition to this Tenth Circuit panel's decision in this case being contrary to the cases of the Supreme Court, they are also in conflict in the Tenth Circuit. In United States v. Ware, 608 F.2d 400 (10th Cir. 1979), the panel of the Tenth Circuit approved an

instruction which read:

> Defendant's conduct is not 'willful' if he acted through negligence, inadvertance, or mistake, or due to his good faith misunderstanding of the requirements of the law.

Concerning such instruction, that panel stated, at page 405:

> Considering that these were the circumstances which led up to his action, the instruction given that it was not willful if his action was due to his good faith understanding of the requirements of law was adequate.

See also United States v. Brown, 600 F.2d 248 (10th Cir. 1979), and United States v. Hoopes, 554 F.2d 721 (10th Cir. 1976).

Said decision also conflicts with that of other Circuits with regard to a good faith, though erroneous, assertion of the privilege negating the element of willfulness and constituting a defense to a prosecution for willful failure to file a tax return. See e.g. United States v. Thiel, 619 F.2d 778 (8th Cir. 1980).

The Tenth Circuit panel's opinion, in

affirming the conviction of this Defendant and the limitation on argument of counsel, approved orders that directed counsel for the Defendant not to argue the facts in evidence, any inferences therefrom, and the applicable law to the jury. As indicated in the statement of the case, the Defendant refused to answer many questions on his 1040 Tax Form asserting his Fifth Amendment privilege not to incriminate himself. Further, there was evidence admitted at the trial that the Defendant acted upon his good faith belief in his right to so assert the privilege rather than give the information. The Trial Court's orders must be viewed in light of that postuer of the case.

The Trial Court directed, at page 82 (Trans. Trial):

> And what I am saying and what I have ruled and what is going to bind you in argument is that his reason for putting-- not putting complete information in his tax return that was predicated upon a belief that by putting in there "self-incrimination" or

"Fifth Amendment" or anything related to that is not proper argument.

In response to that statement, counsel for the Defendant stated:

COUNSEL: --I would intend to argue to the jury that he (Defendant) did not know that the law required him to provide that information as opposed to asserting his Fifth Amendment claim.

COURT: Well, you can't do that. You can't do it. That is what I have just ruled.

In further discussion with the Court, at page 83 (Trans. Trial), concerning the assertion of the privilege and the reason therefore:

COUNSEL: That is evidence as to what was in his mind at the time he did the return.

COURT: I know, but I am ruling as a matter of law that is not justification for failing to file a return...

Further in the argument, at page 87 (Trans. Trial):

COUNSEL: I assume your ruling is that I can't argue the Fifth Amendment at all or mention it?

COURT: That's right....

With regard to the arguing of the evidence at trial, the following occurred at page 88-9 (Trans. Trial):

> PROSECUTOR: ...As I understand it now, what about the question of whether or not Mr. Roberts can read from the memorandum the cases and that? (P.Ex. 1,2,3) That would seem that perhaps, under your ruling here, that he can't do that.
>
> COURT: He cannot.

Thus the Trial Court, with the approval of the Tenth Circuit, directed counsel not to argue the facts and evidence admitted into trial, and how they related to the instructions as given. Further, the Court ordered counsel not to argue what the Defendant's state of mind was, his intent, when he filed the return, which was all in the evidence at the time of trial.

The United States Supreme Court has held that the Defendant has a constitutional right, granted in the Sixth Amendment, to have his counsel make an argument to the jury based upon the facts and evidence, any inferences

that can be drawn therefrom, and the applicable law. See Herring v. New York, 95 S.Ct. 2550 (1975). Such includes the Defendant's constitutional right to have his theory of the case argued vigorously to the jury. See also United States v. DeLoach, 504 F.2d 185 (D.C. Cir. 1974), and United States v. Sawyer, 443 F.2d 712 (D.C. Cir. 1971).

The standard for review when there is a constitutional error is the "reasonable doubt" test of the Harmless Error Rule. Thus the Government would be forced to demonstrate that the error was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed. 2d 705 (1967).

DATED this 11th day of July, 1983.

ROBERTS & ROBERTS

By _____
THOM D. ROBERTS
Attorney for Petitioner

CERTIFICATE OF SERVICE

COMES NOW Thom D. Roberts of Roberts & Roberts, a member of the Bar of the above entitled Court, and hereby certifies that he has sent three (3) copies of this Petition for Certiorari and Appendix by mailing three (3) copies thereof, postage prepaid, through the United States postal service, to the Solicitor General, Department of Justice, Washington, D.C. 20530, and the United States Attorney for the District of Utah, Post Office Building, Salt Lake City, Utah 84101, on this 11th day of July, 1983, and that such constitutes service on all parties required to be served herein.

ROBERTS & ROBERTS

By _____
THOM D. ROBERTS
Attorney for Petitioner

APPENDIX

Not For Routine Publication

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	No.
vs.	)	82-1648
	)	
DARYL R. JENSEN, Jr.,	)	
	)	
Defendant-Appellant.	)	

Appeal from the United States District Court for the District of Utah, Central Division (D.C. No. CR-82-00012W)

Tena Campbell, Assistant United States Attorney (Brent D. Ward, United States Attorney, with her on the brief), Salt Lake City, Utah, for Plaintiff-Appellee.

Thom D. Roberts of Roberts & Roberts, Salt Lake City, Utah, for Defendant-Appellant.

Before BARRETT, McKAY and LOGAN, Circuit Judges.

BARRETT, Circuit Judge.

Daryl R. Jensen (Jensen) appeals his jury convictions of failure to file an income tax return for 1978 and 1979 in violation of 26 U.S.C.A. §7203. Jensen was found not guilty of failure to file a 1977 income tax return.

During trial the Government established that: Jensen filed appropriate tax returns for 1972, 1974, 1975 and 1976; Jensen earned $31,492.44 in 1977, $38,715.42 in 1978, and $30,621 in 1979; Jensen's 1977, 1978 and 1979 tax returns did not set forth earned income and were completed with the words "none" and "object-self incrimination"; Jensen was notified that the returns were unacceptable as filed, that additional forms would have to be filed, and that failure to provide income for the years in question could result in criminal prosecution, in 1977 Jensen filed withholding certificates with his employers in which he claimed up to 100 exemptions; and

that in 1978 and 1979 Jensen filed withholding certificates in which he claimed to be exempt from all federal withholding tax.

The Government also introduced two letters received from Jensen in which he expressed his "good faith belief in his right to object to the information sought, provided legal support for his position, and suggested what actions the Government should take with regard to challenging the validity of his claims." (Appellant's brief at p. 3).

Jensen did not testify or call any witnesses. Prior to closing arguments of counsel, the district court ruled: Jensen's good faith assertion of his Fifth Amendment privilege and refusal to provide income information did not in any way negate the willfulness of his actions; Jensen's state of mind vis-a-vis his assertion of the privilege was "out of the case" and could not, as a matter of law, justify his failure to

file a return; and that Jensen could not mention the Fifth Amendment privilege or argue its applicability during his closing argument.

On appeal Jensen contends that: (1) an individual has a right to object, upon the Fifth Amendment grounds of self incrimination, to individual questions on a tax return, and the issue of the validity of one's assertion of his privilege should be submitted to a jury with appropriate instructions; (2) a good faith, though erroneous, assertion of a Fifth Amendment privilege in response to an individual question on a tax return is a defense to a prosecution for willful failure to file a return; (3) the district court erred in failing to instruct on the good faith defense, and its definition of willful did not explicitly include the good faith defense; (4) the district court improperly limited the argument of counsel; and (5) the evidence was insufficient to establish beyond a

reasonable doubt the willfulness of his conduct of a lack of good faith in asserting the Fifth Amendment privilege.

I.

Jensen contends that an individual has a right to object, upon the Fifth Amendment grounds of self incrimination, to individual questions on a tax return. Jensen further contends that once an individual has asserted his Fifth Amendment privilege, the validity of the assertion must be submitted to the jury under appropriate instructions. We disagree.

The Fifth Amendment privilege against self incrimination does not allow an individual to refuse to provide any information on a tax return. In United States v. Moore, 692 F.2d 95, 97 (10th Cir. 1979) we stated:

> The Supreme Court has held the Fifth Amendment is not a defense for failing to make any tax return, United States v. Sullivan, 274 U.S. 259, 47 S.Ct. 607, 71 L.Ed. 1037 (1927), although a Fifth Amendment objection can be raised in response to a particular question on the return if the question calls for a privileged answer. See Garner v.

> United States, 424 U.S. 648, 96 S.Ct. 1178, 47 L.Ed.2d 370 (1976). This Court held in United States v. Irwin, 561 F.2d 198, 201 (10th Cir. 1977), cert. denied, 434 U.S. 1012, 98 S.Ct. 725, 54 L.Ed.2d 755 (1978) that a tax return containing no information but a general objection based on the Fifth Amendment did not constitute a return as required by the Internal Revenue Code, and did not contain a claim sufficiently specific to invoke Fifth Amendment protection.

See also United States v. Brown, 600 F.2d 248 (10th Cir. 1979), cert. denied 444 U.S. 917 (1979). We hold Jensen was not entitled to make a blanket Fifth Amendment objection to completing the returns; accordingly, an instruction relative thereto was inappropriate. Although the Fifth Amendment privilege against self incrimination may be employed to protect a taxpayer from revealing an illegal source of income, it does not protect one from disclosing the amount of his income. United States v. Brown, supra.

Jensen contends that his good faith, though erroneous, assertion of his Fifth Amendment privilege in response to an indi-

vidual question on a tax return is a defense to a prosecution for willful failure to file a tax return. This contention is meritless.

In United States v. Pomponio, 429 U.S. 10, 12 (1976) the Supreme Court held that willfulness in the context of the income tax statutes "simply means a voluntary, intentional violation of a known legal duty." That Jensen was fully aware of his legal obligation to file a completed tax return by setting forth his earned income is revealed by the appropriate returns he filed prior to 1977. The district court's rejection of Jensen's good faith argument was correct:

> I'm going to instruct the jury that it is an established rule of law that the Fifth Amendment privilege doesn't excuse the taxpayer from his duty to prepare and file a tax return and it doesn't justify his refusal to file a return within the meaning of the Internal Revenue Code. If that were the case, anybody that had some notion about what the law is and that it would excuse them, however outlandish that notion is, they would have a good faith defense.

(R., Vol. V at p. 54). Jensen's good faith reason for violating a known legal duty is

irrelevant. United States v. Dillon, 566 F.2d 702 (10th Cir. 1977), cert. denied, 435 U.S. 971 (1978). Jensen's own rationalization of the protective parameters of the Fifth Amendment privilege against self incrimination is of no moment, when, as here, he attempts to adopt an individual standard different from that applicable to the remainder of the citizenry. In United States v. Ware, 608 F.2d 400, 406 (10th Cir. 1979) we stated:

> The defendant contends that his personal belief in what the law is, or should be, supersedes the federal Constitution and statutes as construed and applied by the Supreme Court. If each citizen is a law unto himself, government will exist in name only. See Reynolds v. United States, 98 U.S. 145, 166-167, 25 L.Ed. 244 (1879), and United States v. Grismore, 564 F.2d 929, 932-933 (10th Cir. 1977).

Jensen's contention that the district court erred in failing to instruct on his good faith defense is without merit. In United States v. Pomponio, supra, the Court

specifically held that where a trial judge adequately instructs on willfulness, "(a)n additional instruction on good faith (is) unnecessary." 429 U.S. at p. 13.

II.

Jensen contends that the district court erred in ruling that he could not argue his good faith assertion of the Fifth Amendment privilege against self incrimination during closing arguments. We hold the district court did not err in limiting Jensen's closing argument.

As set forth above, the Fifth Amendment privilege against self incrimination does not allow an individual to refuse to provide the amount of his income on a tax return. United States v. Moore, supra. Also, a demonstration of good faith is not a defense to a charge of willfully failing to file an income tax return, when, as here, it is shown that the defendant intentionally violated his known legal duty to file a return. United States v.

Dillon, supra. Under such circumstances, we hold the district court properly limited Jensen's closing arguments.

III.

Jensen contends that the evidence at trial was insufficient to establish beyond a reasonable doubt his willfulness in failing to file appropriate returns and his lack of good faith in his assertion of the Fifth Amendment privilege. We hold the evidence was more than sufficient to establish beyond a reasonable doubt that Jensen willfully violated his known legal duty to file a return.

AFFIRMED.

No. 83-79

In the Supreme Court of the United States

OCTOBER TERM, 1983

DARYL R. JENSEN, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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TABLE OF AUTHORITIES

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No. 83-79

DARYL R. JENSEN, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

This is a tax protester case. Petitioner seeks review of his conviction for willfully failing to file income tax returns, asserting that the district court improperly limited his argument to the jury.

1. Following a jury trial in the United States District Court for the District of Utah, petitioner was convicted of willfully failing to file income tax returns for 1978 and 1979, in violation of 26 U.S.C. 7203.[1] On Count II (relating to 1978), petitioner was sentenced to one year's imprisonment and ordered to pay the costs of prosecution not to exceed $5,000. On Count III (relating to 1979), petitioner was sentenced to one year's imprisonment, six months of which

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[1] Petitioner was acquitted of a similar violation relating to 1977 (Pet. 4).

were suspended on the conditions that petitioner pay a fine of $2,000 and file all prior and current tax returns due. Petitioner was also placed on probation for three years. The court of appeals affirmed (Pet. App. A1-A9).

2. Evidence introduced by the government at petitioner's trial established the following facts: During the years 1977, 1978, and 1979, petitioner, an electrician, earned gross income in the respective amounts of $31,492, $38,715 and $30,621 (Tr. 15). Petitioner filed Forms 1040 with the Internal Revenue Service ("IRS") purporting to be his federal tax returns for each year, but he failed to include thereon any requested information except his name, address, occupation and marital status (Exhs. 1, 2, 3). On each line requesting tax-related information (such as gross income, deductions, taxable income, and tax due), petitioner inserted the words "object, self-incrimination" or "none." Attached to each Form 1040 was a "memorandum" consisting of quotations from judicial decisions that assertedly justified a taxpayer's refusal, on Fifth Amendment grounds, to provide tax information; the "memorandum" included an argument that a "good faith erroneous claim of privilege cannot lawfully be punished" and that a "good faith erroneous claim of privilege entitles a taxpayer to acquittal under [Section] 7203."[2]

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[2]Petitioner also attached to each Form 1040 other materials said to support his Fifth Amendment claim. These included clippings from various periodicals, bearing titles like "Big Brotherism Grows" and referring to the "growing Tax Revolt"; documents referring to prosecution of other tax protesters; and a copy of a Form 1040 filed by another taxpayer who, like petitioner, had inserted the words "object, self-incrimination" or "none" on every line (Exhs. 1, 2, 3).

The government also introduced evidence that petitioner had filed proper tax returns for 1972-1976, which set forth all requested tax-related information (Exhs. 4, 5, 6); that the IRS had notified petitioner, shortly after receiving his 1977 and 1978 submissions, that they did not constitute acceptable "tax returns" and that he risked criminal prosecution (Exhs. 9, 10); that petitioner had submitted, within a single three-month period in 1977, three different W-4 forms to his various employers, claiming 40, 60, and 100 exemptions for wage withholding purposes (Exhs. 23, 25); and that petitioner had submitted W-4 forms during 1978 and 1979 claiming to be exempt from all withholding tax (Exhs. 32, 40). Finally, the government introduced into evidence two letters from petitioner to the IRS expressing his "good faith belief" in his right to refuse to supply the information requested on the tax forms (Pet. App. A2).

Petitioner's counsel did not offer any evidence at trial, nor did petitioner testify on his own behalf. Rather, petitioner's counsel proceeded immediately to his closing argument, in which he attempted to argue to the jury that petitioner's assertion of the Fifth Amendment on his tax forms was made in good faith and thus negated the "willfulness" requisite to conviction under Section 7203 (Pet. 5-6). Pursuant to a warning issued during a previous conference on jury instructions, the court foreclosed this line of argument, ruling that petitioner's alleged Fifth Amendment reasons for refusing to supply any tax-related information were "not a justification for failure to file a return" (Tr. 82).

3. The court of appeals correctly ruled (Pet. App. A4-A5) that petitioner could not rely on a blanket assertion of his Fifth Amendment privilege to justify a refusal to provide *any* tax-related information whatsoever. *Albertson* v. *SACB*, 382 U.S. 70, 78-79 (1965) ("a self-incrimination claim against every question on the tax return * * * would be virtually frivolous"); *United States* v. *Sullivan*, 274 U.S.

259, 263-264 (1927). See, *e.g.*, *United States* v. *Barney*, 674 F.2d 729, 731 (8th Cir.), cert. denied, 457 U.S. 1139 (1982); *United States* v. *Johnson*, 577 F.2d 1304, 1310-1311 (5th Cir. 1978) (citing cases). This Court's decisions have long made clear that the Fifth Amendment privilege must be invoked selectively, in response to particular questions that might tend to incriminate; it does not license a wholesale refusal to fill out a tax form. *Marchetti* v. *United States*, 390 U.S. 39, 50 (1968); *Albertson*, 382 U.S. at 78-79; *Sullivan*, 274 U.S. at 263-264.

4. Petitioner maintains (Pet. 7-15) that his blanket invocation of his privilege against self-incrimination, while erroneous, was nevertheless made in good faith; that his good faith negated "willfulness"; and that the trial judge accordingly erred in precluding his counsel from raising the Fifth Amendment issue in closing argument. It is of course true that a defendant cannot be convicted under Section 7203 "for an erroneous claim of privilege asserted in good faith." *Garner* v. *United States*, 424 U.S. 648, 663 & n.18 (1976). Yet this principle has little if any application here, for there was simply no credible evidence before the jury that petitioner had invoked the privilege in the sincere belief that he was entitled to do so. Petitioner did not testify in his own defense and presented no other evidence of good faith. Petitioner's letters to the IRS (Pet. App. A2) and the "memoranda" he attached to his purported tax returns (Exhs. 1, 2, 3) did no more than invoke the privilege and assert, self-servingly, that it was claimed in good faith. These materials do not suggest that petitioner consulted counsel about his theory of the Fifth Amendment, nor do they indicate in any way why petitioner thought that responding to the questions on the tax forms might incriminate him. At the time petitioner's counsel began his closing argument, therefore, there was no evidence that would have permitted the jury to evaluate a claim that petitioner had

relied in good faith on the privilege against self-incrimination and, hence, no reason for the trial judge to permit such argument. *Battle* v. *United States*, 209 U.S. 36, 38 (1908); *Bird* v. *United States*, 187 U.S. 118, 132 (1902); *United States* v. *Lavallie*, 666 F.2d 1217, 1219 (8th Cir. 1981).[3]

5. Even assuming that petitioner should have been permitted to make his Fifth Amendment argument to the jury, any error by the trial judge in this regard was clearly harmless beyond a reasonable doubt. Here, the only conclusion the jury could have reached, on the basis of the evidence before it, was that petitioner had acted in bad faith.

The evidence established, for example, that petitioner had filed "normal" returns for 1972-1976, indicating his awareness of the duties imposed by the tax laws (Exhs. 4, 5, 6). The documents petitioner submitted for 1977-1979 were of the standard "tax protester" variety, setting forth no tax-related information whatsoever and asserting the Fifth

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[3]The cases upon which petitioner relies (Pet. 10-11) are of no help to him. In *United States* v. *Murdock*, 290 U.S. 389, 396-397 (1933), this Court upheld a defense of good faith (but erroneous) invocation of the privilege in view of the unsettled state of Fifth Amendment law at the time. In this case, by contrast, the law was absolutely clear, when petitioner filed his purported tax returns, that a blanket invocation of the Fifth Amendment on a tax return was unjustifiable (see p. 3, *supra*), and petitioner offered no objective evidence on which a rational jury could have found that he possessed a good faith belief to the contrary. In *United States* v. *Thiel*, 619 F.2d 778, 781 (8th Cir.), cert. denied, 449 U.S. 856 (1980), *United States* v. *Ware*, 608 F.2d 400, 405 (10th Cir. 1979), and *United States* v. *Hoopes*, 545 F.2d 721, 722-723 (10th Cir. 1976), cert. denied, 431 U.S. 954 (1977), the defendants (unlike petitioner here) took the stand and attempted to explain that their actions were taken in good faith, *e.g.*, by stating that they had consulted an attorney. In *United States* v. *Brown*, 600 F.2d 248, 258-259 (10th Cir. 1979), cert. denied, 444 U.S. 917 (1979), the court refused to require a "good faith" instruction where the defendant "did not present evidence capable of establishing a good faith defense," noting that "it is difficult to establish good faith where the defendant has chosen not to testify."

Amendment even as to his social security number (Exh. 3).[4] The cases quoted in petitioner's "memorandum" explicitly state that a blanket assertion of the privilege on a tax return is unjustifiable.[5] Indeed, petitioner's "memorandum" had the foresight to argue that "a good faith erroneous claim of privilege cannot lawfully be punished" (Exh. 3, at 3), casting considerable doubt on the sincerity of his protestations. At the same time that petitioner was filing his "Fifth Amendment" tax returns, he was filing W-4 forms with his employers (Exhs. 23, 25, 32, 40) claiming exemption from wage withholding or claiming a sufficient number of exemptions to prevent withholding; these actions belie any suggestion that his Fifth Amendment claim was genuine, and make clear that he was merely attempting to avoid paying the taxes he owed.

In addition, petitioner was twice notified by the IRS that his purported returns were unacceptable and that he risked criminal prosecution, yet he persisted in filing substantially identical protest returns, and there is no evidence that he took any steps (*e.g.*, consulting a lawyer) to check the

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[4]Several courts of appeals have ruled that the filing of a "Fifth Amendment return," containing "no information from which the IRS can compute a tax," amounts to *per se* evidence of the unreasonableness of the filer's invocation of the privilege. *E.g.*, *United States* v. *Barney*, 674 F.2d at 731; *United States* v. *Johnson*, 577 F.2d at 1311.

[5]Petitioner's "memorandum," for example, quotes (Exh. 3, at 3) *Heligman* v. *United States*, 407 F.2d 448, 450-451 (8th Cir. 1969), which states that "[t]he privilege must be specifically claimed on a particular question" and that "a blanket privilege against the mere making or filing of the return" is unsupportable. *Garner* v. *United States*, upon which petitioner's "memorandum" principally relies (Exh. 3, at 2-3), states that "the questions in [an] income tax return [are] neutral on their face" and that "requiring certain basic disclosures fundamental to a neutral reporting scheme does not violate the privilege." 424 U.S. at 660-661, 662 n.16.

validity of his alleged views. Finally, the district judge carefully instructed the jury on "willfulness," stating that petitioner could be convicted of failure to file a return only upon proof that his "failure to act was voluntary and purposeful and with the specific intent to fail to do what he knew the law required to be done" (Tr. 115-116).[6] In convicting petitioner, the jury plainly concluded that he was aware of his duty to supply information on his tax return.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General

OCTOBER 1983

[6]It is not clear why the jury convicted petitioner of failing to file returns for 1978 and 1979, yet acquitted him of that charge for 1977. The jurors may have reasoned that petitioner's actions became willful only after he submitted his 1977 documents and was notified by the IRS that they did not constitute "tax returns."

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